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Washington, D.C. 20463

2002 DEC 20 P 1: 15

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5123

DATE COMPLAINT FILED: 10/26/00

DATE OF NOTIFICATION: 11/02/00

DATE ACTIVATED: 10/26/01

EXPIRATION OF STATUTE OF
LIMITATIONS: 10/17/05¹

COMPLAINANT:

David Plouffe, Executive Director
Democratic Congressional Campaign Committee

RESPONDENTS:

Friends of Phill and Jay F. Ketterling, as treasurer
Phill D. Kline
Dwight D. Sutherland, Jr.

RELEVANT STATUTES:

2 U.S.C. § 431(17)
2 U.S.C. § 431(18)(A)
2 U.S.C. § 434(a)(2)(A)(i)
2 U.S.C. § 434(b)(2)(A)
2 U.S.C. § 434(c)
2 U.S.C. § 434(c)(2)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441a(f)
2 U.S.C. § 441d(a)(3)
11 C.F.R. § 100.22(a)
11 C.F.R. § 100.23
11 C.F.R. § 109.1(a)
11 C.F.R. § 109.1(b)(4)(i)
11 C.F.R. § 109.1(b)(4)(i)(B)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

¹ The statute-of-limitations ("SOL") date listed in CMS is October 18, 2005. However, since the earliest date of any violation in this matter is October 17, 2000, this Office intends to revise the SOL date in CMS to reflect an SOL date of 10/17/05.

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I. GENERATION OF MATTER

This matter was generated by a complaint submitted by David Plouffe, as executive director of the Democratic Congressional Campaign Committee ("DCCC"), alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), and related regulations by Friends of Phill and Jay F. Ketterling, as treasurer, Phill D. Kline, and Dwight D. Sutherland, Jr. (collectively "Respondents"). The DCCC alleged that Mr. Sutherland made, and Mr. Kline and his principal campaign committee, Friends of Phill, accepted more than \$25,000 in coordinated in-kind contributions.

Respondents were notified of the complaint on November 2, 2000. Dwight Sutherland, Jr. responded, through counsel, by letter dated December 6, 2000, with an attached affidavit. Friends of Phill and Phill Kline have not responded to the complaint, although Mr. Kline and his campaign manager, John Kerr, provided affidavits as part of Mr. Sutherland's response.

II. FACTUAL AND LEGAL ANALYSIS

A. The Applicable Law

1. Contributions and Expenditures

The Act defines a contribution as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The Commission has defined "anything of value" to include, among other things, all in-kind contributions, *i.e.*, "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services" 11 C.F.R. § 100.7(a)(1)(iii). The Act further provides that a person may make up to \$1,000 in contributions per election to any candidate for federal office, or his authorized committee. 2 U.S.C. § 441a(a)(1)(A). A candidate or political committee may not

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1 knowingly accept any contribution in violation of the contribution limits found at section 441a.
2 2 U.S.C. § 441a(f). Furthermore, all reports must disclose the total amount of all contributions
3 from persons other than political committees. 2 U.S.C. § 434(b)(2)(A).

4 Expenditure is defined as "any purchase, payment, distribution, loan, advance, deposit, or
5 gift of money or anything of value, made by any person for the purpose of influencing any
6 election for Federal office." 2 U.S.C. § 431(9)(A)(i). An expenditure made by any person "in
7 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
8 authorized political committees, or their agents, shall be considered a contribution to such
9 candidate." 2 U.S.C. § 441a(a)(7)(B)(i).

10 **2. Independent Expenditures**

11 An independent expenditure is an expenditure by a person expressly advocating the
12 election or defeat of a clearly identified candidate, "which is made without cooperation or
13 consultation with any candidate, or any authorized committee or agent of such candidate, and
14 which is not made in concert with, or at the request or suggestion of, any candidate, or any
15 authorized committee or agent of such candidate." 2 U.S.C. § 431(17). The term "clearly
16 identified" means, *inter alia*, that the name of the candidate involved appears. 2 U.S.C.
17 § 431(18)(A). In pertinent part, 11 C.F.R. § 100.22(a) defines "express advocacy" as any
18 communication that "[u]ses phrases such as 'vote for the President,' 're-elect your
19 Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican
20 challenger for U.S. Senate in Georgia,' 'Smith for Congress,' [or] 'Bill McKay in '94,'"

21 The independent expenditure regulations in effect at the time of the alleged violations
22 stated that a communication "[m]ade with the cooperation or with the prior consent of, or in
23 consultation with, or at the request or suggestion of, a candidate or any agent or authorized

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1 committee of the candidate" included an arrangement, coordination, or direction by the candidate
2 or an agent prior to the broadcast of the communication. 11 C.F.R. § 109.1(b)(4)(i).
3 Expenditures were presumed to be coordinated when they were "made by or through any person
4 who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an
5 authorized committee, or who is, or has been, receiving any form of compensation or
6 reimbursement from the candidate, the candidate's committee or agent." 11 C.F.R.
7 § 109.1(b)(4)(i)(B).²

8 In addressing the issue of what constitutes "coordination" with a candidate, the court in
9 *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), discussed two general ways in
10 which coordination could occur: first, "expressive coordinated expenditures made at the request
11 or the suggestion of the candidate or an authorized agent" would be considered coordinated; and
12 second,

13 absent a request or suggestion, an expressive expenditure becomes
14 'coordinated' where the candidate or her agents can exercise control over,
15 or where there has been substantial discussion or negotiation between the
16 campaign and the spender over, a communication's: (1) contents; (2) timing;
17 (3) location, mode or intended audience (e.g., choice between newspaper
18 or radio advertisement); or (4) 'volume' (e.g., number of copies of printed
19 materials or frequency of media spots).
20

² On November 30, 2000, the Commission approved a final coordination rule, 65 *Fed. Reg.* 76,138 (December 6, 2000). The Commission's new coordination regulation at 11 C.F.R. § 100.23 became effective on May 9, 2001. 66 *Fed. Reg.* 23,537 (May 9, 2001). The Commission simultaneously amended its "Independent Expenditure" definition and related definitions at 11 C.F.R. § 109.1 to track more closely the statutory definition and to conform to the new coordination rule. The Commission deleted 11 C.F.R. § 109.1(b)(4) because "the standards for coordination set forth in that section were overbroad." 65 *Fed. Reg.* 76,138, 76,145. The Commission has considered activity that occurred prior to the effective date of 11 C.F.R. § 100.23, as in this matter, under the coordination standards set forth in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999). The Bipartisan Campaign Reform Act of 2002 repeals 11 C.F.R. § 100.23 as of the date that the Commission is required to promulgate certain new regulations. The Commission has determined that this date is December 22, 2002. On December 5, 2002, the Commission adopted new coordination rules, which (unless objected to by Congress) will appear at 11 C.F.R. Part 109.

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Id. at 92. The court also found that coordination might be established if an individual had a certain level of decision-making authority for both the spender and the campaign and the spender made the expressive expenditures to assist the campaign. *Id.* at 96-97.

The Act also requires that every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year file a statement containing the information required under 2 U.S.C. § 434(c). Pursuant to 2 U.S.C. § 434(a)(2)(A)(i), pre-election reports must be filed no later than the 12th day before any election, and must be complete as of the 20th day before the election. "Any independent expenditure . . . aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before any election shall be filed within 24 hours after such independent expenditure is made." 2 U.S.C. § 434(c)(2).

B. The Complaint

The DCCC stated that Mr. Sutherland, an alleged member of Phill Kline's campaign steering committee, "Team 2000," contributed \$1,000 to Friends of Phill on August 25, 2000.³ According to the DCCC, after making his \$1,000 contribution, "Mr. Sutherland then paid for a

³ Friends of Phill's original 2000 October Quarterly Report shows the receipt, dated August 25, 2000, of a \$1,000 contribution designated for both the primary and general elections from Mr. Sutherland. Friends of Phill's amended 2000 October Quarterly Report designated the August 25, 2000 contribution to the general election only.

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1 radio advertisement . . . on stations WDAF and KMBZ," which contained the disclaimer "[p]aid
2 for by Dwight Sutherland, Jr." The DCCC claimed that "Mr. Kline and his committee are
3 broadcasting a vicious attack ad in the name of a contributor to avoid taking responsibility for its
4 content."

5 The DCCC stated, "By paying more than \$25,000 for radio advertisements on behalf of a
6 candidate, Mr. Sutherland has made additional contributions to the Kline campaign far in excess
7 of federal contribution limits." The DCCC also alleged that Friends of Phill "has not returned
8 the contribution or reported its receipt as required by law." The DCCC further stated, "Having
9 already accepted the maximum contribution allowed by law, Phill Kline cannot allow Mr.
10 Sutherland to fund these advertisements on his behalf."

11 The DCCC acknowledged that a person might support a candidate by making
12 independent expenditures, which are not contributions and not subject to limits. The DCCC
13 alleged, however, that since Mr. Sutherland is "a member of Mr. Kline's campaign steering
14 committee," he "cannot plausibly argue he paid for these advertisements without the knowledge,
15 advice, consent, or coordination of Phill Kline's campaign." The complaint cited to the then-
16 existing regulation at 11 C.F.R. § 109.1(b)(4)(i)(B), and stated, "As a member of Kline's
17 coordinating committee, Mr. Sutherland is presumed to be working with the campaign, and his
18 expenditures will not be considered independent." Finally, the complaint alleged, "Even if these
19 contributions could be considered independent expenditures, Mr. Sutherland has not filed a
20 statement of independent expenditure and has thus failed to comply with the requirements of the
21 law."

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C. The Sutherland Response⁴

The Sutherland response stated that "[o]n October 17, 2000, Mr. Sutherland bought \$25,750 in radio advertising on WDAF-AM and KMBZ-AM." The response included a transcript of the radio advertisement, which ended as follows: "Vote for Phill Kline, the Republican Candidate for the United States House of Representatives in Kansas' Third District. Paid for by Dwight Sutherland, Jr."

2. Coordination

The response stated that "Mr. Sutherland wrote the copy for his ad and purchased the radio air time independently and without any coordination with the Candidate or his campaign." The affidavits of Messrs. Sutherland, Kline, and Kerr supporting these claims were attached to

⁴ The response included a signed copy of Mr. Sutherland's "Commitment to Submit Matter to ADR Program." Since Mr. Kline and Friends of Phill did not respond to the complaint and did not request ADR, this matter remained in the Office of General Counsel.

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1 the response. The response acknowledged that Mr. Sutherland contributed to Friends of Phill,
2 raised contributions for the campaign, and allowed his name to be used under the banner "Team
3 2000" on some invitations and in some advertisements. However, the response stated that Team
4 2000 was not "a campaign steering committee or a coordinating committee for the Candidate,"
5 and that "Mr. Sutherland was not a member of any campaign steering committee or coordinating
6 committee for Mr. Kline's campaign." The affidavit of Mr. Sutherland stated that Team 2000
7 "was an informally organized group of approximately 20 people who lent their names to support
8 the Candidate by raising funds for his campaign." The response argued that the advertisement
9 did "not constitute coordination under the statute, the Regulations, a recent opinion of the
10 District Court for the District of Columbia, or the newly revised Regulations issued by the
11 Commission."

12 a. Former regulation

13 With regard to the former regulatory presumptions of coordination, the response claimed
14 that "[t]he Complaint can and does only point to one presumption potentially implicated by
15 Mr. Sutherland's activities." The provision referenced is the former regulation at 11 C.F.R.
16 § 109.1(b)(4)(i)(B), which presumed that expenditures were coordinated when "[m]ade by or
17 through any person who is, or has been, authorized to raise or expend funds" The response
18 admitted that "Mr. Sutherland was a part of 'Team 2000' and did raise funds for the campaign."
19 However, the response argued that "there is no definition as to what the phrase 'person who is, or
20 has been, authorized to raise . . . funds' in section 109.1(b)(4)(i)(B) actually means." The
21 response also stated that "[c]ampaigns authorize almost everyone to raise funds, for they need
22 contributions solicited by supporters to perform their functions." The response claimed that the

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1 "vague regulatory language" at section 109.1(b)(4)(i)(B) "is an insufficient basis for the
2 Commission to proceed against Mr. Sutherland."

3 The response also argued that the facts in this case "easily rebut" the presumption at
4 section 109.1(b)(4)(i)(B). The response stated that "the Commission has two small facts, one
5 placing Mr. Sutherland in the Candidate's campaign voluntary fundraising apparatus and another
6 showing that the campaign used his name on invitations and in advertisements." The response
7 contended that Mr. Sutherland was not "privy to the plans, strategies, or key activities of"
8 Mr. Kline's campaign, and that there was no "evidence of actual collusion between
9 Mr. Sutherland and" Mr. Kline, Friends of Phill, or Mr. Kline's agents.

10 **b. Revised regulation**

11 The response argued that Mr. Sutherland's activity satisfied the revised regulations at
12 section 109.1(b)(4). The response stated that the revision to the regulations "eliminated the
13 presumption of coordination found in section 109.1(b)(4)(i)(B), which was the only possible,
14 although incorrect, way the Complaint could have implicated Mr. Sutherland in coordinating his
15 radio ad." The response presented three arguments why Mr. Sutherland's radio advertisement
16 did not constitute coordination under the revised regulations. The first argument was that
17 Mr. Sutherland "did not create, produce, or distribute the ad at the request or suggestion of the
18 Candidate or any of the listed individuals or committees in the Regulations." The second
19 argument maintained that only Mr. Sutherland "drafted the radio ad, decided when to place the
20 ad, and purchased the ad with his own funds." The final argument was that "[t]here is no
21 evidence, nor could there be, of 'substantial discussion or negotiation' between the Candidate, or
22 listed individuals or committees, and Mr. Sutherland over any part of the production of the radio
23 ad."

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c. **Christian Coalition**

The response further argued that "the activities of Mr. Sutherland do not even approach the definition of coordination recently handed down" in *FEC v. Christian Coalition*. After an examination of the various fact patterns presented in that case, the response argued that "Mr. Sutherland's participation in the Kline campaign did not approach the degree, intensity, or access to information that the volunteers implicated in *Christian Coalition* did." The response argued that Mr. Sutherland was only "peripherally involved in limited fundraising activity." Since the court did not find that the Christian Coalition's involvement in the various campaigns constituted coordination, the response argued that "[t]he Commission should arrive at the same result when viewing the limited activity of Mr. Sutherland."

D. **Analysis**

The affidavit submitted by Mr. Sutherland in response to the complaint included a transcript of the radio advertisement, which reads as follows:

Two thousand years ago the Roman statesman Cicero warned its fellow citizens against what he called "the arrogance of officialdom." By this I understand him to be referring to the tendency of some elected officials to think they are smarter or wiser than the people they were elected to represent.

I thought of this phrase recently when I heard that Third District Democrat, Dennis Moore, had publicly ridiculed the intelligence of an elderly constituent who had written to Moore about the Social Security System. Moore's calling the constituent an idiot is not the kind of representation Kansans want from their members of Congress.

By contrast, Republican Phill Kline, will not forget where he came from or who sent him to Washington. Phill Kline knows that ours is a government in the words of our First Republican President, Abraham Lincoln, "of the people, by the people, and for the people." Vote for Phill Kline, the Republican Candidate for the United States House of Representatives in Kansas' Third District. Paid for by Dwight Sutherland, Jr.

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1 Mr. Sutherland's affidavit also included the following statement: "I wrote the script for
2 the radio ad and purchased the advertisement without the cooperation of, the prior consent of, or
3 in consultation with, in concert with, or at the request or suggestion of the Candidate or any
4 agent of his authorized committee, Friends of Phill." Mr. Sutherland further averred, "I wrote
5 the script for the radio ad and purchased the advertisement without any arrangement,
6 coordination, or direction by the Candidate or his agents prior to the publication, distribution,
7 display, or broadcast of the advertisement." The nearly identical affidavits of Messrs. Kline and
8 Kerr, respectively the candidate and his campaign manager, corroborated Mr. Sutherland's
9 response. The affidavits submitted by both stated, "Neither I, nor anyone connected with the
10 campaign, conferred with Mr. Sutherland about his decision to run the advertisement or discuss
11 [sic] its contents with him or act [sic] in any way in connection or cooperation with him in
12 running the advertisement."

13 The available information indicates that there is no reason to believe that the radio
14 advertisement purchased by Mr. Sutherland was coordinated with Friends of Phill under former
15 11 C.F.R. § 109.1(b)(4)(i)(B), 11 C.F.R. § 100.23, or *Christian Coalition*. The sworn affidavits
16 submitted by Messrs. Sutherland, Kline, and Kerr all aver that Mr. Sutherland did not coordinate
17 his advertisement with Friends of Phill or Mr. Kline. The complaint's reliance on Team 2000,
18 without more, to establish coordination is rebutted by these affidavits. Since the advertisement
19 contained express advocacy – "Vote for Phill Kline" – and was not shown to be coordinated, it
20 constitutes an independent expenditure instead of an in-kind contribution in excess of the
21 contribution limits. See 2 U.S.C. § 431(17) and 11 C.F.R. § 100.22(a). Therefore, this Office
22 recommends the Commission find no reason to believe Dwight D. Sutherland, Jr. violated 2
23 U.S.C. § 441a(a)(1)(A), find no reason to believe Phill D. Kline violated 2 U.S.C. § 441a(f), and

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1 find no reason to believe Friends of Phill and Jay F. Ketterling, as treasurer, violated 2 U.S.C. §§

2 434(b)(2)(A) or 441a(f).

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IV. RECOMMENDATIONS

- 1.
2. Find no reason to believe that Dwight D. Sutherland, Jr. violated 2 U.S.C. § 441a(a)(1)(A).

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3. Find no reason to believe that Friends of Phill and Jay F. Ketterling, as treasurer, violated 2 U.S.C. §§ 434(b)(2)(A) or 441a(f), and close the file as to them.
4. Find no reason to believe that Phill D. Kline violated 2 U.S.C. § 441a(f), and close the file as to him.
- 5.
- 6.
7. Approve the appropriate letters.

Date

12/20/02


Lawrence H. Norton
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